

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2011-0818
	:	
v.	:	On Discretionary Appeal from the
	:	Coshocton County Court of Appeals,
Sandra Griffin,	:	Fifth Appellate District, Case No.
	:	2009CA21
Defendant-Appellee.	:	

**Response of Appellee Sandra Griffin to
the State's Motion to Summarily Reverse**

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I. Introduction

The court of appeals correctly applied this Court's precedent to find that the trial court did not issue a final order because the judgment entry of sentence did not include the "fact of conviction." The court of appeals also correctly held that in a case in which a sentencing hearing is not held pursuant to R.C. 2929.03(F), the section does not apply because, by its express language, R.C. 2929.03(F) applies only "in a case in which a sentencing hearing is held pursuant to [that] section." R.C. 2929.03(F).

Summary reversal would put in doubt this Court's holding in *State v. Lester*, Slip Opinion No. 2011-Ohio-5204, that an entry is not final unless it contains the "fact of conviction." And even though summary reversal would close the door on this unique case, it would open a new appellate window to every capital defendant with a proper Crim.R. 32(C) judgment who was convicted when some courts incorrectly held that a single judge could hear a capital case as long as the prosecutor promised not to seek the death penalty. Further, summary reversal would create confusion because lower courts would not know which portions of this Court's prior holdings it was overruling. And because this case involves subject matter jurisdiction in capital cases, any change in precedent could have significant unforeseen consequences.

This Court should deny the State's motion for summary reversal.

II. The State's motion fails to address the distinction between a "substantive" and "clerical" omissions.

A. The failure to include the "fact of conviction" in a judgment entry of sentence is a "substantive" error renders the entry non-final.

The trial court's error in this case was "substantive," not "clerical," as this Court defined those terms in *Lester*. Under *Lester*, the failure to include the "fact of a conviction" in the entry is a substantive error that prevents the judgment from being final and appealable:

We further observe that Crim.R. 32(C) clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes of appeal and that the rule states that those requirements "shall" be included in the judgment entry of conviction. These requirements are the fact of the conviction, the sentence, the judge's signature, and the entry on the journal by the clerk. . . .

Crim.R. 32(C) does not require a judgment entry of conviction to recite the manner of conviction as a matter of substance, but it does require the judgment entry of conviction to recite the manner of conviction as a matter of form.

Lester, at ¶11-12 (underline added, italics in original).

Here, the State does not dispute that original judgment entry of sentence did not include the "fact of conviction." As a result of that *substantive* omission, the entry is not a final order.

B. A summary reversal would call into question this Court's bright line holding in *Lester* and force the lower courts to read tea leaves to determine what is and is not a final order.

Summary reversal in this case would call into question this Court's bright line holding in *Lester*, that an entry is not final if it does not include the "fact of conviction." Lower courts would not know exactly why this Court ruled

as it did, so summary reversal would create confusion as to what is and is not a final order. And as the litigation history of the last few years demonstrates, confusion over what constitutes a final order casts a veil of uncertainty over the finality of far too many judgments.

If this Court determines that *Lester* might need to be changed, this Court should receive briefs and hear argument. Changing the definition of a final order, and therefore changing when an appellate court does and does not have subject matter jurisdiction, is too important to be done on a summary basis.

III. A sentencing entry is a sentencing entry, not a defective R.C. 2929.03(F) capital sentencing opinion.

When the Fifth District issued its initial opinion affirming the conviction, it accepted the State's argument that because the prosecution agreed "not to request the death penalty[,]," the case was "no longer a case within the ambit of the sentencing provisions of R.C. 2929.03 et seq." *State v. Griffin* (1993), 73 Ohio App. 3d 546, at 553. The State and the court of appeals were right—the trial court in this case did not even attempt to apply any of "the sentencing provisions of R.C. 2929.03 et seq." Accordingly, the trial court did not even try to issue an R.C. 2929.03(F) sentencing opinion; the trial court issued a standard, non-capital sentencing entry; but the trial court failed to include the "fact of conviction" in that standard, non-capital sentencing entry.

In another filing in this case, the State correctly explains that "[f]or purposes of judgment entries, a 'conviction' equals a guilty verdict or finding plus a sentence." State's Response to Motion to Dismiss as Improvidently Allowed, Oct. 28, 2011, at 3, citing *State v. Henderson* (1978), 58 Ohio St.2d

171, 177-8.¹ Under the reasoning of *Henderson*, the guilty verdict that the trial court issued in this case was not a “conviction” for purposes of the final order rule because it was issued before sentencing. It was a mere verdict, not a final order.

IV. Summary reversal might help the State in this unique case, but it would open the door to virtually every other capital defendant in cases in which capital sentencing procedures were not followed.

The State’s argument is short-sighted—it might well regret “winning” the argument that R.C. 2929.03(F) applies to cases (like Miss Griffin’s) in which trial courts mistakenly assumed that capital requirements did not apply. As Miss Griffin has explained in more detail elsewhere,² before this Court issued *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, many trial courts permitted capital defendants to proceed to trial or to plead guilty in front of

¹ The relevant part of *Henderson* states:

Appellant has pointed out, and we agree, that various other provisions of the Criminal Code employ the term “conviction” in the sense of the legal ascertainment of guilt as opposed to a final judgment. For example, R. C. 2947.25(A), which deals with a psychiatric examination before sentencing reads: “After conviction and before sentence, a trial court shall refer for examination all persons convicted of a violation of section 2907.02 or 2907.03 of the Revised Code * * *.” R. C. 2949.02 also makes a similar distinction: “When a person has been convicted of any bailable offense * * * and such person gives notice in writing * * * such judge or magistrate may suspend execution of the sentence or judgment * * *.” See, also, Crim. R. 46(E); R. C. 2929.02(B).

However, the distinction between conviction and sentencing in these few provisions exists solely for the purpose of depicting various procedures to be followed during the interval after a defendant's guilt is legally adjudicated and before an appropriate penalty or treatment is determined. . . .

² See Memorandum in Response, June 13, 2011, pp. 10-11.

single judges. In those cases, the trial courts operated under the incorrect assumption that the capital requirements of R.C. 2929.03 did not apply. As a result, it is unlikely that any of those trial courts issued sentencing opinions under R.C. 2929.03(F).

So if the State is correct that R.C. 2929.03(F) applies to cases in which “in a case in which a sentencing hearing is [not] held pursuant to [that] section[,]”³ no final order exists in most, if not all, other cases in which a single judge presided over a capital case does not have a final order, and the defendants in those cases can obtain final orders, appeal anew, and obtain a new trial.

Conclusion

If this Court dismisses the State’s appeal in this case, this Court will leave unchanged its previous rulings on what a trial courts must do to create a final order in both capital and non-capital cases. By contrast, a summary reversal would muddy the bright line rules that this Court has drawn, and would create uncertainty as to what is and is not a final order in a capital case, possibly opening a door that countless defendants will be able to walk through.

If this Court wishes to leave its rulings on subject matter jurisdiction unchanged, this Court should either dismiss this appeal or summarily affirm the decision of the court of appeals. If this Court wishes to reopen its rulings on what constitutes a final order, it should do so only after briefing and

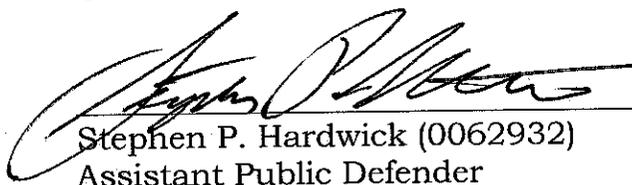
³ Quoting the language of R.C. 2929.03(F).

argument. But summarily reversing the decision of the court of appeals would create confusion and would have consequences that the State would regret.

This Court should deny the State's motion to summarily reverse.

Respectfully submitted,

Office of the Ohio Public Defender



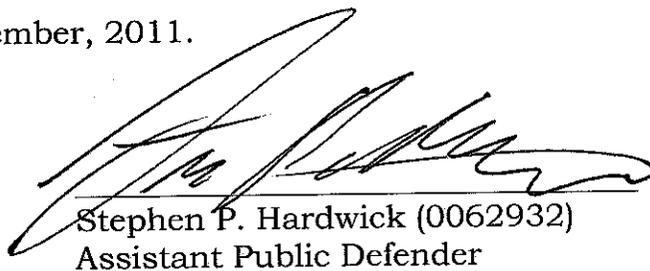
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Certificate of Service

I certify that a copy of the foregoing was sent by regular U.S. Mail to Jason Given, Coshocton County Prosecutor, 318 Chestnut Street, Coshocton, Ohio 43812 this 7th day of November, 2011.



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